

No. 54.

United States Circuit Court of Appeals

NINTH CIRCUIT.

BRUSH ELECTRIC COMPANY,

Appellant,

vs.

CALIFORNIA ELECTRIC LIGHT CO. ET AL.,

Appellees.

ESTEE. FITZGERALD & MILLER,

For Appellees.

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IN THE
United States Circuit Court of Appeals

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BRIEF FOR APPELLEES.

Statement of Facts

This suit was brought by the Brush Electric Company, an Ohio corporation, and the California Electric Light Company and San José Light and Power Company as joint complainants against the Electric Improvement Company of San José, another California corporation, to restrain the infringement of U. S. Letters Patent No. 219,208 granted to Charles F. Brush on September 2, 1879, for an electric arc lamp. The bill was filed January 20, 1891. (Record 54.)

Without going into detail, it will be sufficient for the purposes of this case to say that the Brush

Electric Company is the owner and holder of the legal title to the patent; that the California Electric Light Company is the owner and holder of an exclusive license for the States of California, Oregon, Washington and Nevada, "to use and sell, but not to manufacture," the patented invention; that the California Electric Light Company has granted to the San José Light and Power Company a license for the towns of San José and Santa Clara; that the defendant is infringing the patent in the towns of San José and Santa Clara, and this suit is brought to restrain such infringement.

After the bill was filed the Brush Company appeared specially by its counsel and moved the Court to be dismissed from the suit on the alleged ground that it had been begun without its consent. The motion was denied and this appeal is taken from the order denying it.

Numerous affidavits were read on the hearing, from which, among other things, it appears that the patent is a valuable one; that the California Electric Light Company has introduced it extensively into use on the Pacific Coast, having established plants in all the principal cities and towns from the British border on the north to the Mexican on the south. (Record 82-3-4-5.) They have put into successful operation seven thousand seven hundred and seventy-eight (7,778) are and

seven thousand seven hundred and sixteen (7,716) incandescent lamps. (Record 66 and 85.) They have invested in the business \$892,531, and have paid to the Brush Company for lamps and other electrical supplies \$683,741. (Record 65.) They established the first central station for electric arc lighting in the world.

It further appears that the Brush Company brought numerous suits for infringement of the patent in the Eastern States, and in every one of them the patent was sustained and injunctions granted, decisions to that effect having been rendered in the East by Judges Gresham, Blodgett, Brown and Ricks, and in San Francisco by Judge Sawyer. The Thomson-Houston Electric Company, located at Boston, but doing business throughout the entire United States, was, until January, 1891, the rival of the Brush Company, and was the licensor of most of the Eastern companies who were sued by the Brush Company. That company had a system of lighting in competition with the Brush. Among the lamps used by them and their licensees was the Wood double carbon lamp, against which the present suit is aimed. The litigation in the East has been most extensive, and twelve different decisions have been rendered sustaining the Brush patent and decreeing the various lamps used by the Thomson-Houston licensees to be infringement. The victory of the

Brush Company was complete and the Thomson-Houston Company was defeated at every point. That company then changed their tactics. In January, 1891, they purchased at an enormous price a majority of the stock of the Brush Company, retired from office the old Board of Directors of the Brush Company and elected a new board in the interest of the Thomson-Houston Company—three of the new directors of the Brush Company being also directors of the Thomson-Houston, and the others being under their control. Silas A. Barton is the present President of the Brush Company, and at the same time is a director and the leading member of the Thomson-Houston Company. The defendant in this case is a licensee (indirectly), of the Thomson-Houston Company, and the Wood patent, which the defendant is using, is the property of the Thomson-Houston Company. (See affidavit of Roe, Record 68-9.) It will thus be seen that the Brush Company is in league and conspiracy with the infringing defendant and inimical to its licensee the California Electric Light Company, and this explains its strenuous efforts to have the suit dismissed.

It further appears that in July, 1890, before the Brush Company sold out to its rival, the Thomson-Houston, the Brush Company and the California Electric Light Company jointly brought suit in this circuit against the Electric Improve-

ment Company of San Francisco for infringement of the Brush patent by use of the Wood lamp. That suit was brought by direct authority of the Brush Company, which company prepared the bill of complaint, verified it by its president, and sent out its own attorney from Cleveland to argue a motion for an injunction. The injunction was granted by Judge Sawyer and the case is now on final hearing before Judge Hawley. (Record 70-1.)

It further appears that the lamp used by the defendant in that suit is the identical Wood lamp being used by the defendant in this case; that the Electric Improvement Company of San José, defendant in this case, is an agent or branch of the Electric Improvement Company of San Francisco, against whom the first suit was brought, although nominally a different corporation, and the Electric Improvement Company of San Francisco actually owns 3,750 shares out of a total capital stock of 5,000 shares of the defendant in this case; that A. J. Bowie, the manager of the San Francisco Company, is the president of the San José Company, defendant, and that the San José Company is under the control, authority and domination of the San Francisco Company. (Aff. of Reynolds, Record 70, 103.)

Mr. Roe also swears that it was always the understanding and agreement between the Brush

Company and the California Electric Light Company that all infringers on this Coast should be actively prosecuted by the two companies and that they should join in all such suits, and this agreement was recognized and fulfilled by the Brush Company up to January, 1891, when they sold out to the Thomson-Houston. (Record 71.) In this he is corroborated by Mr. Kerr (Record 98), and Mr. Cornwall (Record 99), and by N. S. Possons, of Chicago, formerly Superintendent of the Brush Company (Record 101).

Upon these facts, has the California Electric Light Company a right to use the name of the Brush Company as a co-complainant in prosecuting infringers? Put in another form, has an exclusive licensee for a specified territory a right to use the name of his licensor in prosecuting infringers?

Points and Authorities.

It is conceded that the California Electric Light Company is but a licensee. It is given "the exclusive right to use and sell, but not to manufacture," throughout the Pacific Coast (Record 77). This constitutes it a licensee (*Waterman vs. McKenzie*, 138 U. S., 255). The Brush Company still retains the legal title to the patent.

It is also conceded by all that such a licensee cannot sue alone for an infringement, but must

join the owner of the legal title as a co-complainant. The law on this subject is, that in case of infringement within the territory of a licensee, an action at law must be brought in the name of the licensor for the benefit of the licensee, and not otherwise, while a suit in equity may be brought in the names of the licensor and licensee jointly.

Says Mr. Justice Gray in *Birdsell vs. Shaliol* (112 U. S., 485):

“A licensee of a patent cannot bring a suit in his own name, at law or in equity, for its infringement by a stranger; an action at law for the benefit of the licensee must be brought in the name of the patentee alone; a suit in equity may be brought by the patentee and licensee together.”

Waterman vs. McKenzie (138 U. S., 255).

Gayler vs. Wilder (10 How., 477).

Littlefield vs. Perry (21 Wall., 205).

Paper Bag Cases (105 U. S., 756).

Such being the law, it follows that, if a licensor refuses to join in a suit for infringement, and the licensee has no authority to use his name without his consent, then the licensee is without a remedy for a grievous wrong. Here, if the motion of the Brush Company prevails and it be dismissed from the suit, then *the entire suit will fall*, because it cannot be maintained without the presence of the Brush Company; and the California Electric Light Company will be at the mercy of infringers with-

out remedy against them for invasions of its rights. In such case there would be a wrong without a remedy, a thing which equity never tolerates. Therefore, we contend that such is not the law, and we state as our first proposition:

I.

THERE IS AN AGREEMENT IMPLIED BY LAW, IN CASE OF SUCH A LICENSE AS THE ONE DISCLOSED HERE, THAT THE LICENSOR WILL JOIN WITH THE LICENSEE IN SUITS AGAINST INFRINGERS; AND IF HE REFUSES OR IS INACCESSIBLE, THE LICENSEE HAS A RIGHT TO USE HIS NAME WITHOUT HIS CONSENT UPON INDEMNIFYING HIM AGAINST DAMAGE.

If such be the law, then we had a perfect right to use the name of the Brush Company in this case as a co-complainant, even against its consent. That such is the law is settled both by reason and authority.

In Walker on Patents, Section 400 (pages 311-12), it is said:

“ Licensees under patents cannot bring actions for their infringement. Where a person has receive an exclusive license to use or sell * * * all actions at law * * * must be brought in the name of the owner of the patent right, but generally for the use of the licensee; and all actions in equity must be brought by the owner * * * and the exclusive licensee, suing together as joint

complainants. * * * Actions at law brought in the name of the owner of a patent right, but actually begun by an exclusive licensee, *may be maintained by the latter even against the will of the nominal plaintiff, and where an exclusive licensee brings an action in equity in the name of himself and the owner of the patent right, that action may be maintained WITHOUT THE CO-OPERATION AND EVEN AGAINST THE OBJECTION OF THE LATTER.*"

And so likewise Mr. Robinson in his work on patents says at § 938, p. 125, Vol. III:

"It is a part of the implied agreement between a licensor and licensee that the former will protect the latter against those wrongful invasions of his rights by instituting such proceedings as may become necessary for that purpose, and if the legal owner of the monopoly refuses to perform this duty, or is inaccessible, the licensee may sue at law for damages in his name. A suit thus brought is under the control of the licensee, and though the nominal plaintiff may claim indemnity against the costs and expenses of the suit, he cannot discontinue it or settle with the infringer in derogation of the rights of the real party in interest."

In *Goodyear vs. Bishop* (2 Fish., 96) an exclusive licensee brought an action in the name of the licensor to recover damages for infringement. The defendant, *upon the consent of the nominal plaintiff*, moved to dismiss the action. This was in effect a motion by the nominal plaintiff himself to dismiss, and is therefore parallel to the motion made in this case by the Brush Company. But

Judge Nelson denied the motion, thereby holding directly that the licensee could use the name of the licensor even against his consent.

The same doctrine had previously been announced in *Goodyear vs. McBurney* (3 Blatch., 32).

In *Wilson vs. Chickering* (14 Fed., 918) a licensee had brought suit in equity in his own name alone. The defendant demurred for want of proper parties. The Court said:

“I do not, however, intend to be understood that the plaintiff will be without remedy if he cannot find the patentee, or if the latter is hostile. The statute does not abridge the power of a Court of Equity to do justice to the parties before it, if others who cannot be found are not absolutely necessary parties, as in this case the patentee is not. At law the plaintiff could use the name of the patentee in an action, and perhaps he may have that right in equity under some circumstances. The bill gives no explanation of his absence; but it was said in argument that *he is both out of the jurisdiction and hostile*. If so, no doubt there are methods known to a Court of Equity by which the suit may proceed for the benefit of the only person who is entitled to damages.”

Accordingly the demurrer was sustained with leave to file an amended bill. The trend of the decision is apparent. In our judgment it means that the licensee had a right to join the licensor, even without his consent.

But to place the matter beyond all doubt, so far as the authority of another case is concerned, we refer the Court to the case of *Brush-Swan Electric Company vs. Thomson-Houston Electric Company* (48 Fed. Rep., 224). There an exclusive licensee of certain territory under this same Brush patent, had, in connection with this same Brush Company, brought a suit in equity for infringement. The Brush Company, for the same purpose of swindling its licensee, as in the case at bar, appeared by special counsel and made the same motion that is made here, to be dismissed from the suit on the ground that it had been brought without its consent. The learned Judge Shipman rendered the following opinion:

“Shipman, J. This is a bill in equity, which is brought under the patent laws, to restrain an alleged infringement of Letters Patent No. 219,208, dated September 2, 1879, to Charles F. Brush. The bill alleges that the Brush-Swan Electric Light Company of New England, a New York corporation, which will hereafter be called the Brush-Swan Company, is vested with the exclusive license and agency for the sale of the described patented improvement throughout a specified territory of the United States, by virtue of sundry contracts, which are annexed to the bill, with the Brush Electric Company, an Ohio corporation, hereinafter called the Cleveland Company, which is, by assignment, the sole owner of the patent. These two corporations are the complainants. The bill further alleges that the defendant, the Thomson-Houston

Electric Company, a Connecticut corporation, is and has been making, selling, using and renting to others to be used, infringing electric lamps within the territory named in said contracts.

“The matter now under consideration is the Cleveland Company’s motion to strike out its name as a party complainant because the bill has been filed without its authority or consent. It is conceded that the bill was brought by solicitors of the Brush-Swan Company without the knowledge of the Cleveland Company, and that no express authority to bring suits in its name had been given either in said contracts or otherwise; but it is contended that by virtue of the license, the licensee has the implied consent and authority to use the name of the owner of the patent as a co-complainant, and a vested right to bring a suit in its name, whether with or against its will. The facts in this case are peculiar. The various contracts ‘of license and agency’ give to the Brush-Swan Company an exclusive agency and license for the sale, within a specified territory, of ‘the dynamo electric machines and apparatus made and sold by, or the patents for which are controlled by the parties of the first part.’ The patents are described. The Brush-Swan Company is not to sell apparatus of the described character except that sold by the Cleveland Company, without its consent. The Cleveland Company is to fix prices, and the agent is to have a discount of 20 per cent. The parent company has no right to sell machines or apparatus within the specified territory, except under circumstances to be mutually agreed upon, and in such case it pays to the Brush-Swan Company the 20 per cent. discount. The contracts are, in their important feature, contracts of agency between a

principal manufacturer and a selling agent. In some of their features they have the appearance of contracts between a manufacturer and a person who is, under certain limitations, to have the exclusive right to purchase and deal in the manufactured articles within a specified territory; but they are probably contracts of license, under the patent laws, to sell within a specified portion of the United States, a patented improvement manufactured by the owner of the patent. The licensor became distrustful of the licensee; thought that it had broken its contract, desired to put an end to the agency and declared the contracts to be terminated. Litigation ensued in the Southern District of New York, which has proceeded to an interlocutory decree, and has thus far resulted favorably to the Brush-Swan Company. The entire capital stock of the Cleveland Company is \$2,500,000, of which \$2,000,000 are common and \$500,000 preferred stock. During the year preceding January 19, 1891, about nineteen-twentieths of the common stock went into the hands of the defendant in this case, the Thomson-Houston Electric Company. It thus appears that the defendant is in control of the Cleveland Company.

“ Upon the motion, the Brush-Swan Company contended broadly that the licensee to sell a patented device within a specified territory, has an absolute implied right under all circumstances to join the owner of the patent, against his will, in a bill of equity against a person who is alleged to infringe the entire patent right of the owner by making, selling, using and renting infringing devices. This general question I do not intend to decide. It is obvious that if the licensee of the bare right to sell has, under all circumstances, by the

mere agreement to license, such an absolute, implied power, which cannot be controlled by a Court of Equity, it is a large power. He can by joining the owner of the entire legal and remaining equitable right in the patent, compel him to enter into an expensive and perilous litigation, or to submit to an adjudication in regard to the validity or the construction or the extent of his patent, which may be injurious to his pecuniary interests. If the interest of the owner, who has merely given his agent a license to sell within a specified territory, and who is still the owner of the substantial and important portion of the patent, can be against his will and without the service of process, subjected to litigation and judicial decree, there is danger that the power of the licensee will be wantonly exercised. On the other hand it is reasonably certain that a licensee can, in an action at law, use the name of the owner of the patent (*Wilson vs. Chickering*, 14 Fed. Rep., 917; *Goodyear vs. McBurney*, 3 Blatch., 32; *Same vs. Bishop*, 4 Blatch., 438), and it has also been declared with positiveness, that a licensee of a patent cannot bring a suit in his own name, at law or in equity, for its infringement by a stranger (*Birdsell vs. Shuliol*, 112 U. S., 486, 5 Sup. Ct. Rep., 244). In this case, the Cleveland Company is really a co-defendant, in view of the Thomson-Houston Company's controlling ownership of its stock; but being a resident of Ohio, it cannot be served with process as a co-defendant in this action. Though it cannot be compelled to come into Court as a defendant, 'a Court of Equity looks at substance rather than form. When it has jurisdiction of the parties, it grants the appropriate relief, whether they come as plaintiff or defendant' (*Littlefield vs. Perry*, 21

Wall., 205), and places them according to the real positions which they respectively occupy in the controversy.

“ The necessity of making the owner of the patent a party in an action for infringement is authoritatively declared in *Waterman vs. Mackenzie*, 138 U. S., 252, 11 Sup. Ct. Rep., 334, as follows:

“ ‘ In equity as in law, when the transfer amounts to a license only, the title remains in the owner of the patent, and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as when the patentee is the infringer, and cannot sue himself.’

“ In this case it is true that the Cleveland Company is called upon to attack the acts of its controlling owner, and in a certain sense, to sue for its own infringement; yet the two corporations are separate legal entities; one can sue the other; and it is not necessary for the licensee to sue alone in order to prevent an absolute failure of justice. When the owner is not the infringer, and therefore cannot be made a defendant, if the licensee is to have an opportunity to assert his alleged rights he is at a great disadvantage, unless he has the power of bringing a suit in equity in the name of the owner though against his will. In my opinion, he has *prima facie* such an implied power. Whether a Court of Equity would permit a wanton or unjust or inequitable use of the name of the owner of the patent, by the licensee of the bare right to sell within a limited territory, is a question which does not apparently arise, and upon which I express no opinion. The motion is denied.”

We submit that this decision disposes of the

case at bar. Opposing counsel professes to find certain dissimilarities between the two cases. They are stated at page 13-14 of his brief. Upon examination, it will be found that they are puerile. They are dissimilarities as to certain details of fact which in no way affect the legal questions involved.

In this connection it may be asked why we did not make the Brush Company a party defendant. Undoubtedly it is a general rule that where one who should be joined as a plaintiff refuses to join, he may be made a defendant on that ground, the bill alleging that he is made defendant because he refuses to join as plaintiff. If it were possible to pursue that course here, we would be only too glad to do so; but the Brush Company is an Ohio corporation, and under the Act of Congress of March 3, 1887, it cannot be sued in this District. It can be sued only in the District of which it is an inhabitant, and that District is in Ohio. Consequently, it would be a vain and idle thing to make it a defendant, because of inability to procure legal service of process. (*Wilson vs. Western Union*, 34 Fed. Rep., 564; *Denton vs. International Company*, 36 Id., 3.) The Brush Company is "inaccessible" in the character of a defendant; and in order to avert a failure of justice, equity will infer and presume a permission to use the name of that company as a complainant.

Otherwise, there would be a wrong without a remedy.

II.

BUT THE RECORD SHOWS THAT THE BRUSH COMPANY GAVE ITS EXPRESS CONSENT TO THE USE OF ITS NAME IN THIS CASE.

This position is denied by opposing counsel. Judge Hawley was inclined to rule in our favor on the point, and no doubt would have done so, if it had been necessary. It was not necessary, however, because he ruled the first point heretofore discussed in our favor, and that ended the controversy.

It is admitted that as the first occasion on which the question of suing infringers came up between the parties, the Brush Company not only consented to the suit, but earnestly pressed its institution, preparing the bill of complaint in the East, securing affidavits, drawings and other exhibits, sending almost daily telegrams and letters, insisting that its own counsel should come to California from Cleveland, a journey of 3,000 miles, to argue the motion for an injunction, and manifesting the greatest solicitude for a proper conduct of the case.

Mr. Roe, Secretary of the California Company, swears positively that it had always been the understanding and agreement between the two com-

panies that *all infringers on this Coast should be actively and earnestly prosecuted by both the Brush Co. and the California Co., and that they should join in all actions for infringement and in and out of Court oppose all infringers.* (Record 71.)

In this statement he is corroborated by William Kerr (Record 98), a director of the California Company, P. B. Cornwall (Record 99), President of the company, and N. S. Possons (Record 100), who for a number of years was superintendent of the both the Telegraph Supply Co. and the Brush Co. We call particular attention to the affidavit of Possons. (Record 100.)

A careful perusal of the letters and telegrams, from page 86 to 97 of the Record, must convince any fair-minded persons that the parties had in contemplation suits against all infringers and not merely one.

Besides, it is so far out of the bounds of all reason to suppose that the California Company would place itself in a position of absolute defencelessness against infringers, that such a theory cannot be indulged in. That men of brains and capital would deliver themselves, bound hand and foot, over to infringers, is hard to believe. It is asking too much of human credulity.

But our position is rendered absolutely unassailable when we remember these two facts:

1. *The Brush Company gave its express consent*

to sue the Electric Improvement Company of San Francisco.

2. *That company owns and holds 3,750 shares out of the total 5,000 shares of the capital stock of the Electric Improvement Company of San Jose, defendant in this suit.*

Put these two propositions together, and we have authority to maintain this suit. They show that the San Jose company is but a branch and agency of the San Francisco company. Hence, the right to sue the latter, the parent company, includes the right to sue the former, its mere agency. We submit that this is a perfect answer to the appellant's contention. Equity regards substance, not form. The right to sue the Electric Improvement Company of San Francisco by necessary implication includes the right to sue its agents who are acting by and under its authority.

III.

THE CONTENTION OF APPELLANT THAT THE JOINER OF THE SAN JOSE LIGHT AND POWER COMPANY AS A CO-COMPLAINANT CHANGES THE RULES HERETOFORE DISCUSSED, IS UNSOUND.

Great stress is laid on this point by the appellant, but when examined it will be found to be purely imaginary. This San Jose Light and Power Company is but an agency of the California Electric Light Company, just as the Electric Improve-

ment Company of San Jose is but an agency of the Electric Improvement Company of San Francisco. That it is a separate corporation is conceded; but that is the method pursued by the California Electric Light Company in operating the patented invention throughout the territory. Not only was the San Jose company incorporated for the purpose of operating under the general license from the Brush Company, but similar companies were organized throughout the Pacific Coast. By reference to pages 82 and 83 of Record it will be seen that a large number of similar companies have been organized. Los Angeles, Sacramento, Carson, Virginia, Marysville, San Rafael, Santa Cruz, Oakland, San Bernardino, Red Bluff, Truckee, Eureka, Portland, Vancouver, San Diego, Aberdeen, Bakersfield and Sehome, each has its electric company operating the Brush devices under authority of the California Electric Light Company. This is the way the California Electric Light Company has elected to enjoy its license. The Brush Company has no right to complain of such course. It is the only practicable method of operating the license, and it was within the power of the licensee to adopt it.

The precise point urged is that the California Electric Light Company has assigned to the San José Company all its rights under the license for San José and Santa Clara, without the consent of

the Brush Company, whereas the original license provides that the licensee should not assign the license to anyone without the written consent of the Brush Company. It is perfectly apparent that said prohibitory clause of the license means that the licensee *should not assign the license as an entirety, should not divest himself of all rights thereunder.* It did not mean that the licensee should not create separate companies in separate cities and confer on such companies the right to operate the inventions in those cities. That is all we have done in this case. We have not assigned the license, nor any part of it. According to the bill, *we have merely granted to the San José Company an exclusive right to operate the inventions in San José and Santa Clara.* No rights of the Brush Company are jeopardized, lessened, diminished or imperilled. It is a mere detail, a means, an agency, a method adopted by us for the more perfect enjoyment of our license. The original rights and relations between us and the Brush Company are not changed in the slightest particular, and the contention now urged by the Brush Company is a mere pretense and a sham.

But even if we had no right to enter into the present relationship with the San José Company, that fact would not destroy our right to use the name of the Brush Company, and it could not be urged as a reason for dismissing it from the suit.

If it be a violation of our contract with the Brush Company, it does not destroy or impair the original license, but merely gives to the Brush Company a cause of action for the breach. That stipulation is an independent covenant. It is in no way related to the implied covenant for the use of the Brush Company's name. And it is a covenant whose breach, if there be a breach, must be investigated and tried in the ordinary manner by proper pleadings putting it in issue and by the examination and cross-examination of witnesses in open Court, called for the express purpose. To do this, the Brush Company can institute a suit for cancellation of the license, or for damages, or for an injunction against further operation under the license. But in this case such question is purely collateral and cannot be investigated.

Again, if there was no authority to grant the license to the San José Company, then it is void, passes no rights, and the relationship of the parties is precisely the same as it was before the attempted license to the San José Company. In such event the California Electric Light Company would still possess all of its original rights and could maintain this suit. Consequently, the counsel's argument is *felo de se*.

There are several minor propositions discussed in counsel's brief, but they are so manifestly frivolous and based on such a palpable misconcep-

tion of the patent law, that we refrain from discussing them.

In conclusion, we submit that this proceeding is purely and simply a cold-blooded iniquitous scheme on the part of the Thompson-Houston Company, acting under the guise of the Brush Company, to destroy its rival which has been built up by California genius, and to wipe it from the face of the earth. There is not a particle of conscience or good faith in their case, and it would indeed be a mockery to hold that equity will not only countenance such an iniquity, but will stretch forth its long arms to aid and uphold it.

It was Lord Camden who said: "Nothing can call a Court of Equity into activity but conscience, good faith, and reasonable diligence."

ESTEE, FITZGERALD & MILLER.

